INDEX

PAGE

Reasons for granting rehearing 2

In holding against appellees on a decisive issue, a position was attributed to the District Court and appellees which they did not take 2

a. The Position of Appellees 4

b. The Position of the District Court 5

c. Railroad participation by virtue of concurrences in joint rates covering a joint rail-motor Plan I service in no way involves a concession that, absent such joint rates and a joint service, railroad consent can expand a motor carrier's authority to permit it to use a rail car in performing Part II motor carrier service 8

d. Section 203(a)(13) of the Interstate Commerce Act, 49 U.S.C. § 303(a)(13), and the other authority provisions of Part II relied upon by appellees, precluded the concession attributed to appellees and the District Court 9

Conclusion 11

Certificate of counsel 11

AUTHORITIES CITED

Motor-Rail-Motor Traffic in East and Midwest, 219 I.C.C. 245 (1936) 8

Movement of Highway Trailers by Rail, 293 I.C.C. 93 (1954) 4, 6

St. Clair County v. Interstate Sand and Car Transfer Co., 192 U.S. 454 (1904) 10

Interstate Commerce Act:

Secs. 1(4), 2, 3(1), 49 U.S.C. §§ 1(4), 2, 3(1) 3

Sec. 203(a)(13), 49 U.S.C. § 303(a)(13) 9, 10

Sec. 216(c), 49 U.S.C. § 316(c) 6, 7, 8, 9

Code of Federal Regulations:

49 CFR § 141.0(b)(3) Joint Rate 7

49 CFR § 141.19(a) Concurrences 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 57

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 59

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 60

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

PETITION FOR REHEARING OF WESTERN AND SOUTHEASTERN RAILROADS

Appellees, Western and Southeastern Railroads named in the Appendix hereto, petition the Court for a rehearing, pursuant to Rule 58, of the second question stated by the Court, that is: "Does the Interstate Commerce Commission have authority to promulgate rules providing . . . (2) that motor and water carriers may, subject to certain conditions, utilize TOFC facilities in the performance of their authorized service?" (Op. p. 1.)

In support of their petition these appellees respectfully state:

REASONS FOR GRANTING REHEARING

In reaching its conclusion on the second question, the Court devoted all but a small portion of its Opinion concerning the limitations on motor carrier authority to a concession said to have been involved in the argument of appellees and the reasoning of the District Court detailed below. The existence or nonexistence of this concession was not specifically briefed. While a rereading of our brief does not reveal any obvious misstatements that might have lead to misunderstanding of appellees' position, we readily recognize that our brief and argument may not have clarified and stressed the differences between procedures taken to initiate joint intermodal services and steps taken to offer open-tariff operations as much as would have been helpful in the resolution of the issues. *The position of appellees is and has been that motor carriers may not legally ship their freight-laden motor vehicles by rail, with or without railroad consent, but may only participate in a joint motor-rail service.* We respectfully request an opportunity for rehearing to establish that no other position has been conceded.

IN HOLDING AGAINST APPELLEES ON A DECISIVE ISSUE, A POSITION WAS ATTRIBUTED TO THE DISTRICT COURT AND APPELLEES WHICH THEY DID NOT TAKE.

The Court rejected (Op. pp. 15-17) our argument (Brief pp. 18-36) and the District Court's holding (244 F. Supp, pp. 964-965, 968-969) that motor carriers are required by the Interstate Commerce Act to perform their authorized service by operating motor vehicles upon the public highways, and therefore may not ship their trailers by rail under open-tariff TOFC Plans III and IV.

This is an independent and dispositive issue. If, as we contend, the Act forbids motor carriers to ship their trailers under railroad open tariffs, the question of the applicability of §§ 1(4), 2 and 3(1) of the Act, 49 U.S.C. §§ 1(4), 2 and 3(1), is not reached.

As the District Court put it:

> "Even if the Act specifically commanded the railroads to serve motor carriers and ordinary shippers without discrimination, there would remain the question whether the motor carriers could lawfully avail themselves of that service without violating their contracts with customers or exceeding the rights conferred by the certificate of public convenience and necessity which authorizes their operations. In other words, we are bound to consider the statutes regulating the operations of motor carriers as well as those imposing obligations upon the railroads." (244 F. Supp. at 964.)

In discussing this question, this Court concluded that the ". . . 'concurrence' of the railroads, where granted, permits truckers to use TOFC service not only pursuant to Plans I and V, supra, but also under Plans III and IV, the latter being open-tariff arrangements." (Op. p. 16.)

At no point have the railroads taken the position that a "concurrence" was involved in a Plan III or a Plan IV operation. Furthermore, the railroads have at no point conceded that motor carriers could lawfully utilize Plan III and Plan IV railroad open tariffs to perform their authorized motor carrier service, even with railroads' consent. (We assume that the word "appellants" appearing twice on page 16 of this Court's Opinion should be "appellees.")* We believe a careful review of our brief will establish that no such concession has been made.

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* Appellants of course would have no authority to concede away positions taken by appellee railroads, in any event.

Similarily, a review of the District Court's opinion will establish, we believe, that it in no way conceded that motor carriers could lawfully perform their authorized service by trying to make use of railroad Plan III or Plan IV open tariffs, even with railroad consent.

a. The Position of Appellees.

The railroads and the freight forwarders have contended throughout this case, and the District Court agreed, that it would be a violation of the Interstate Commerce Act for a railroad to accept a motor carrier's trailer tendered for transportation under a railroad's open tariff. The law seemed well-settled as to that, at least since the decision in 1954 in *Movement of Highway Trailers By Rail,* 293 I. C. C. 93. There the specific question was posed (pp. 104-105) whether a railroad could lawfully accept a motor carrier's trailer tendered under the railroad's open tariff. The Commission answered no, saying (p. 105):

> "[I]f the railroad is on notice that trailers tendered in this manner are being operated in common carrier service subject to Part II of the act, *it should not thus knowingly join with the motor common carrier in a violation of the law.* It should be understood that what has just been said refers only to traffic moving by rail under an open tariff and in the absence of a through-route arrangement between the connecting carriers." (Emphasis supplied.)

The railroads and freight forwarders cited and relied upon the foregoing passage in their briefs in this Court. See briefs of Western and Southeastern Railroads, p. 40; Eastern Railroads, pp. 38-39; Southern Railway, p. 11; Freight Forwarders, pp. 5, 48-49.

At no place in their briefs, or elsewhere, did the railroads and freight forwarders suggest or agree that motor

carriers may use Plans III and IV open tariffs with the consent of the railroads. That would have been inconsistent with the plainly expressed position which they espoused and to which the Commission had adhered until its decision in the case at bar.

Moreover, the appellants (the Government, and the American Trucking Associations and other motor carrier parties) made no contention or suggestion in their briefs that the appellees or the District Court were taking, or at any time had taken, the position that motor carriers could use railroad open tariffs with the consent of the railroads.

We deal below with the assertion that railroad participation in joint rate-through route operations under Plans I and V, where formal concurrences are filed to create join rates, somehow involves a concession that any kind of consent, including mere acceptance of traffic, wipes away the statutory restrictions limiting a motor carrier to the use of a motor vehicle on a public highway.

b. The Position of the District Court

The District Court specifically held that the Interstate Commerce Act in terms forbids motor carrier use of Plans III and IV, and it found no exception to this rule based on the railroads' consent. 244 F. Supp. at 964-965, 968-969. Thus, the District Court held that the Act authorizes motor carriers "to engage in for-hire transportation by 'motor vehicle', not by rail or other modes, and on the 'public highway.'" 244 F. Supp. at 965. Further on the same page the District Court held that the Act requires "that motor carriers shall perform their authorized services by motor vehicle unless shipment by other modes is permitted by some specific statutory exception." The Court found

no statutory exception that authorized use of open-tariff Plans III and IV. These are holdings that exclude any conception that the railroads and motor carriers may lawfully agree upon the use of rail open-tariff TOFC plans. At no place in its opinion did the District Court hold or suggest that the provisions of the Act upon which it relied could be circumvented by the agreement of the railroads.

The District Court cited and relied upon (244 F. Supp. at 968) *Movement of Highway Trailers by Rail (New Haven* case*)*, 293 I.C.C. 93 (1954), and other Commission decisions which held that it is "repugnant to the Act" for a motor carrier "to act as a common carrier by motor vehicle and as a shipper by rail as to the same service." In *New Haven* it was specifically held, as we have shown above, that a railroad would be violating the Interstate Commerce Act if it accepted a motor carrier's trailer tendered for transportation under a rail open tariff, 293 I.C.C. at 105.

The Court apparently bases its appraisal of the District Court's position in substantial part upon the passage from page 967 of the latter's opinion which the Court quotes at pages 15-16. The Court emphasizes the words "without the railroad's concurrence." It should be noted that the word "concurrence" as there used in connection with § 216(c) is a term of art carrying a well defined meaning and does not represent acceptance of traffic under open tariffs from a shipper, whether an ordinary shipper or another carrier. It is the legally approved method of filing a *joint rate* with the Commission. The filing of such "concurrences" in the case of a joint motor-rail service set up under Plan I or Plan V legally invokes the authority of the motor carrier and the authority of the railroad in offering a joint service. Therefore, no violation of the authority provisions of Part II results.

Under Plans III and IV the railroad publishes a railroad tariff and there is no concurrence by the motor carrier in the rail tariff so as to create a joint rate. There is no concurrence by the railroad in any motor carrier tariff. The motor carrier independently purports to offer a shipper rail service, an illegal act since it may not use a rail car to perform its authorized service.

In Tariff Circular 20 issued by the Interstate Commerce Commission the following provision appears:

> 49 CFR § 141.0(b) Definitions. . . . (3) *Joint rate.* The term "joint rate", as used in this part, is construed to mean a rate that extends over the lines of two or more carriers and that is made by arrangement or agreement between such carriers and evidenced by concurrence or power of attorney.

Another provision specifies one of the methods for establishing the existence of a "concurrence:"

> 49 CFR § 141.19 Concurrence. (a) A carrier desiring to become a participant in a tariff or tariffs issued by another carrier (not by an agent) may do so by filing with the Commission a limited or unlimited concurrence (except as provided in § 141.18(f)) in one of the four following forms. In Forms FC2 and FC4 the limitations must be specifically and unambiguously expressed.

The "concurrence" contemplated by Section 216(c) of the Interstate Commerce Act, 49 U.S.C. § 316(c), is the formal act of assenting to and concurring in a freight tariff filed by another carrier, not the mere act of consenting to the tender of traffic by a shipper, whether an ordinary shipper or another carrier. The District Court used the term accurately in the passage quoted by the Court at pages 15-16. The passage quoted does not support a conclusion that it has provided for some sort of exception

which permits a motor carrier to make use of Plans III and IV, with or without railroad consent. Only as thus read is the sentence consistent with the holding and numerous other statements made by the District Court and referred to above.

c. Rail participation by virtue of concurrences in joint rates covering a joint rail-motor Plan I service in no way involves a concession that, absent such joint rates and a joint service, rail consent can expand a motor carrier's authority to permit it to use a rail car in performing Part II motor carrier service.

These appellees argued on brief that "The Interstate Commerce Act specifically Requires That a Motor Carrier May Perform Its Authorized Service Only By Operating Motor Vehicles Upon the Public Highways." (Brief p. 18.) That statutory requirement cannot be abrogated by railroad agreement or consent. The Act permits a motor carrier to join with a railroad in holding out a *joint service* to a shipper; it specifically does not permit a motor carrier to use a rail car to perform its authorized Part II service as a motor carrier by motor vehicle.

An important difference applicable here is that when a motor carrier and a railroad enter into TOFC Plan I or Plan V arrangements under § 216(c), they are *connecting carriers* and each carrier performs only *its own segment* of the joint service. The rail portion of the haul is rail service only; it is not motor carrier service. *Motor-Rail-Motor Traffic in East and Midwest,* 219 I. C. C. 245, 274 (1936). Hence the motor carrier is performing all of its authorized service on its own segment of the through route, which is the public highway. But TOFC Rule 3(a) authorizes motor carriers to perform "all or any portion of their authorized service through the use of open-tariff TOFC

rates published by a rail carrier." Thus in arrangements under § 216(c) the motor carrier performs its authorized service upon the public highways, while under TOFC Rule 3(a) it performs its authorized service by shipping its trailers by rail. Under Rule 3(a) the motor carrier and the railroad are not connecting carriers; instead they occupy a shipper-carrier relationship.

Hence the use of TOFC Plans I and V by the railroads, in which the motor carriers perform their portion of the joint service on the public highways, is entirely consistent with the railroads' position that Rules 2 and 3 are unlawful because they conflict with the provisions of the Interstate Commerce Act which require a motor carrier to perform its authorized service by operating motor vehicles upon the public highways.

d. Section 203(a)(13) and the other authority provisions of Part II relied upon by appellees precluded the concession attributed to appellees and the District Court.

The essential statutes here involved did not permit appellees to "concede" that motor carriers could use Plan III and Plan IV open tariffs with the consent of the railroads. The definition of a "motor vehicle" in Section 203(a)(13) states specifically that it " . . . does not include any vehicle, locomotive, or car operated exclusively on a rail or rails. . . .". The necessary consequence of that provision is that the authority granted to operate by motor vehicle specifically excludes the use of a car operated on rails.

At pages 16 and 17 the Court makes reference to the authority provisions of Part II, stating that " . . . there is no adequate reason to construe the Act so as to deprive the Commission of the power to authorize the *carriers by*

motor vehicle to use TOFC when that service is offered by railroads to the public on open tariff." (Emphasis supplied.) This conclusion is reached without referring to the language quoted above from Section 203(a)(13) that excludes a rail car from the definition of a motor vehicle.

As stated above, railroads have no power to change the statutory definition of a motor vehicle and thus have no authority to expand the authority of motor carriers so as to permit them to use rail cars as well as motor vehicles in performing their authorized service. Railroad consent, therefore, is irrelevant to the definition of motor carrier authority, since railroad consent could not empower motor carriers to do what the Act denies them the right to do.

With regard to motor carrier use of open tariffs, the only point made in the Opinion concerning construction of the authority provisions of Part II of the Act, beyond the concession attributed to the appellees and the District Court, dealt with motor carrier use of ferries (Op. pp. 16-17.) Use of a ferry does nothing to clarify whether or not a "motor vehicle" includes a rail car.*

It is the position of these appellees that the quoted provision from Section 203 (a)(13) precluded the concession attributed to appellees, is central to the determination of the issues of this proceeding, and that the parties and the transportation industry should have the Court's ruling on the bearing of this provision.

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* Moreover, "a ferry is a continuation of the highway from one side of the water over which it passes to the other. . . ." *St. Clair County* v. *Interstate Sand and Car Transfer Co.*, 192 U. S. 454, 466 (1904).

CONCLUSION

For the foreging reasons, this petition for rehearing of the second question stated by the Court should be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify, pursuant to Rule 58 (1) of the Rules of this Court, that the foregoing petition for rehearing is presented in good faith and not for delay.

Amos M. Mathews

APPENDIX

NAMES OF APPELLEES

Western Railroads

The Atchison, Topeka and Santa Fe Railway Company; Chicago & Eastern Illinois Railroad Company; Chicago & North Western Railway Company; Chicago Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; The Denver and Rio Grande Western Railroad Company; Great Northern Railway Company; The Kansas City Southern Railway Company; Louisiana & Arkansas Railway Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; Northern Pacific Railway Company; St. Louis-San Francisco Railway Company; St. Louis Southwestern Railway Company; Soo Line Railroad Company; Southern Pacific Company; Union Pacific Railroad Company; The Western Pacific Railroad Company.

Southeastern Railroads

Atlanta & West Point Railroad Company; Atlantic Coast Line Railroad Company; Clinchfield Railroad Company; Florida East Coast Railway Company; Georgia Railroad; Gulf, Mobile and Ohio Railroad; Illinois Central Railroad; Louisville and Nashville Railroad Company; Norfolk Southern Railway Company; Seaboard Air Line Railroad Company; The Western Railway of Alabama.